FILED
DEC 27 2006
OFFICE OF THE CLERK
SUPREME COURT, U.S.

(3)

No. 06-686

IN THE
Supreme Court of the United States

LUCKY I. IROMUANYA,

Petitioner,

v.

STATE OF NEBRASKA,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Nebraska

PETITIONER'S REPLY BRIEF

G. MICHAEL FENNER
James L. Koley '54 Professor of Constitutional Law
CREIGHTON UNIVERSITY
SCHOOL OF LAW
2500 California Plaza
Omaha, NE 68178
(402) 280-3090

MICHAEL RIPS
Counsel of Record
AMY LESTER
MARCIA YABLON
JUSTIN B. PERRI
STEPTOE & JOHNSON LLP
750 Seventh Avenue
New York, NY 10019
(212) 506-3900

Attorneys for Petitioner

TABLE OF CONTENTS

Page

REPLY TO RESPONDENT'S STATEMENT OF THE CASE 1

REASONS FOR GRANTING THE WRIT 4

A. Petitioner Raised A Constitutional Objection -- Based On The Denial Of The Right To A Fair Trial -- To The Admission Of The Testimony Of The Victim's Mother. 4

B. The Decision Of The Nebraska Supreme Court Was Based Exclusively Upon The Due Process Clause Of The Fourteenth Amendment 6

CONCLUSION 9

TABLE OF AUTHORITIES

Page

CASES

Bracy v. Gramley, 520 U.S. 899 (1997) 4

In re DLS, 432 N.W.2d 31 (Neb. 1988) 8

Huddleston v. United States, 485 U.S. 681 (1988) 7

Morgan v. Illinois, 504 U.S. 719 (1992) 4

State v. Iromuanya, 719 N.W.2d 263 (Neb. 2006) 5

State v. Kunert, No. A-94-1098, 1995 Neb. App. LEXIS 195 (Neb. App. Ct. June 20, 1995) 7

State v. Simants, 537 N.W.2d 346 (Neb. 1995) 7

State v. Thomas, 685 N.W.2d 69 (Neb. 2004) 4

State v. Timmerman, 480 N.W.2d 411 (Neb. 1992) 7

U.S. v. Gonzalez-Lopez, 126 S.Ct. 2557 (2006) 4

OTHER AUTHORITIES

Richard D. Friedman, *A Close Look at Probative Value*, 66 B.U. L. Rev. 733 (1986) 7

Victor J. Gold, *Limiting Judicial Discretion to Exclude Prejudicial Evidence*, 18 U.C. Davis L. Rev, 59 (1984) 7

D. Craig Lewis, *Proof and Prejudice: A Constitutional Challenge to the Treatment of Prejudicial Evidence in Federal Criminal Cases*, 64 Wash. L. Rev. 289 (1989).....6-7

Leonard Pertnoy, *The Juror's Need to Know vs. The Constitutional Right to a Fair Trial*, 97 Dick. L. Rev. 627 (1993) 4

REPLY TO RESPONDENT'S STATEMENT OF THE CASE

The Respondent has taken issue with two assertions made by the Petitioner: that Petitioner felt threatened at the time the gun went off and that Jenkins, who first attacked the Petitioner and who pushed and beat the Petitioner, was intoxicated.

Petitioner's belief that he was about to be physically assaulted at the time the gun went off is supported by the following testimony from the Record: first, testimony from a number of witnesses that moments earlier the Petitioner had been repeatedly assaulted by Nolan Jenkins and Adam Ellingson;[1] and second, statements by the Petitioner that at the time the gun went off, Petitioner believed -- based on what Jenkins said to Petitioner[2] and the way in which Jenkins approached Petitioner[3] -- that Jenkins and others were returning to assault him again.[4]

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[1] Trial testimony of Brooke Bredenberg (Trial Tr. Vol. IX, 1419-20); Trial testimony of Adam Ellingson (Trial Tr. Vol. XIII, 2015-24); Trial testimony of Allison Scace (Trial Tr. Vol. IX, 1364-66); Trial testimony of Aroun Phaisan (Trial Tr. Vol. XI, 1701-03).

[2] When Jenkins approached Petitioner for the second time, Jenkins said, according to the Petitioner, "'you hit me, didn't you?'" At this point, Petitioner "figured that he was going to try to sw-, try to fight me again." (Iromuanya Videotaped Statement Tr. at 12).

[3] Jenkins came within four inches of Iromuanya's face. (Trial testimony of Carrington Hartley, Trial Tr. Vol. X, 1559).

[4] After the initial confrontation, Jenkins "stepped forward like he was going to hit Lucky." Trial testimony of Nathaniel Buss (Trial Tr. Vol. IV, 684). Carrington Hartley's "initial thought was that Iromuanya might, as a minority person, be feeling threatened." Br. in Opp'n at 3.

Respondent suggests that Petitioner did not feel threatened because he was roughly the same height as Jenkins: The facts are that Jenkins was a state wrestling champion and weightlifter[5] and that Petitioner was surrounded by ten to fifteen of Jenkins' friends.[6]

Respondent claims that Jenkins "wasn't intoxicated, and that Jenkins believed himself to be within the legal limit to drive a car." Br. in Opp'n at 2. The fact is that Jenkins conceded that he was intoxicated and incapable of driving.[7] In addition, Jenkins' own testimony is that he had consumed

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[5] Jenkins, who was also a furniture mover, was capable of bench pressing 340 lbs. Trial testimony of Nolan Jenkins (Trial Tr. Vol. XIII, 2116-17); Trial Testimony of Adam Ellingson (Trial Tr. Vol. XII, 1954).

[6] According to Lindsey Ingram, Jenkins' girlfriend, there were "10 to 15 people in the yard" "surrounding Lucky and Nolan." Trial testimony of Lindsey Ingram (Trial Tr. Vol. V, 797).

[7]
Q. You had a case of Busch Light with you?

A. Yes

Q. That night you had, roughly, 12 beers?

A. Correct

Q. Do you believe you were borderline intoxicated?

A. I had drank 12 beers, so I was in a not driving shape, but I wasn't intoxicated where anybody would worry about me being alcohol intoxicated or making – I wouldn't drive a vehicle, but I don't drink and drive in the first place. So within the legal limits of Nebraska state law, which I believe is point eight, I'm sure I would have blown more than that point eight.

Q. I think you probably mean .08, right?

A. Yes

Trial testimony of Nolan Jenkins (Trial Tr. Vol. XIII, 2109-10)

twelve beers.[8] For a man of Jenkins' size, this would have resulted in a blood alcohol concentration nearly double the legal limit to drive.[9]

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[8] Trial testimony of Nolan Jenkins (Trial Tr. Vol. XIII, 2109-10) (as cited in Petitioner's brief at page 3, footnote 5).

[9] The Drink Wheel, *available at* http://www.intox.com/wheel/drinkwheel.asp.

REASONS FOR GRANTING THE WRIT

In his principal brief, Petitioner argued that a writ of certiorari is necessary to resolve a division among state supreme courts over the issue of whether unnecessary and highly emotional testimony as to the identity of a victim by a member of the victim's family constitutes a denial of a defendant's constitutional right to a fair trial. In reply, the Respondent asserts that the Petitioner did not raise and the Nebraska Supreme Court did not address a constitutional issue. Both assertions are obviously and demonstrably false.

A. Petitioner Raised A Constitutional Objection – Based On The Denial Of The Right To A Fair Trial – To The Admission Of The Testimony Of The Victim's Mother.

The right to a fair trial is a well-established constitutional right that includes both the guarantee of due process under the Fifth and Fourteenth Amendments and the right to an impartial jury under the Sixth Amendment.[10] Petitioner's counsel expressly objected to Mrs. Cooper's testimony on the grounds that the testimony of the victim's mother denied the

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[10] *See U.S. v. Gonzalez-Lopez,* 126 S.Ct. 2557, 2562 (2006) ("The Constitution guarantees a fair trial through the Due Process Clauses, but it defines the basic elements of a fair trial largely through the several provisions of the Sixth Amendment.") (citation and quotations omitted); *Bracy v. Gramley,* 520 U.S. 899, 904 (1997) ("the Due Process Clause of the Fourteenth Amendment establishes a constitutional floor...[that] requires a fair trial in a fair tribunal") (citations and quotations omitted); *Morgan v. Illinois,* 504 U.S. 719, 727 (1992) ("the jury must stand impartial and indifferent to the extent commanded by the Sixth Amendment") (citations omitted); *see also The Juror's Need to Know vs. The Constitutional Right to a Fair Trial,* 97 Dick. L. Rev. 627, 654 n.1 (1993). The Supreme Court of Nebraska has held that the due process clauses under the Nebraska Constitution and the U.S. Constitution are co-extensive. *State v. Thomas,* 685 N.W.2d 69, 78 (Neb. 2004).

Petitioner his constitutional right to a "fair trial": specifically, in Petitioner's motion for New Trial, Petitioner objected to Mrs. Cooper's testimony on the ground that it "prevented Defendant from receiving a *fair trial.*"[11] This was preceded by defense counsel's repeated challenges based upon the impact of Mrs. Cooper's testimony on the jury.[12]

Petitioner's objection, in turn, was expressly recognized and addressed as a constitutional fair trial challenge by the trial court, which stated: "[I]t is the conclusion of the court that [Mrs. Cooper's identification testimony] was not so prejudicial as to have denied the defendant his *right to a fair trial.*" *State v. Iromuanya*, 719 N.W.2d 263, 281 (Neb. 2006) (emphasis added).

On appeal, Petitioner reiterated his constitutional objection,[13] and the Nebraska Supreme Court quoted the trial court's opinion (as excerpted immediately above), making it clear that the Supreme Court recognized Petitioner's argument and the decision of the trial court to be based on a constitutional fair trial objection. *State v. Iromuanya*, 719 N.W.2d 263, 281 (Neb. 2006). Indeed, in summarizing Petitioner's argument, Respondent itself describes Petitioner's Rule 403 objection as a "denial of fair trial" argument. Br. in Opp'n at 2.

Respondent's Opposition also mischaracterizes the scope of Petitioner's constitutional objection to Mrs. Cooper's testimony. Petitioner's fair trial objection included, in

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[11] Motion for New Trial, *State of Nebraska v. Iromuanya*, No. S-05-000367 (Dec. 30, 2004) at ¶ 2 (emphasis added).

[12] Trial Tr. Vol. I, 155-56; Motion to Exclude Witness, *State of Nebraska v. Iromuanya*, No. S-05-000367, at ¶ 2.

[13] Appellant's Br. at 35, *State of Nebraska v. Iromuanya*, No. S-05-000367 (Sept. 9, 2005)

addition to a due process objection under the Fourteenth Amendment, a challenge based on the right to an impartial jury under the Sixth Amendment. *See* Br. of Amicus Curiae at 5-6. For example, on appeal, Petitioner argued that Mrs. Cooper's testimony denied Petitioner a right to a fair trial because the circumstances surrounding the trial made it impossible that a jury hearing her emotional testimony could remain impartial. *See* Br. of Appellant at 35, *State v. Iromuanya*, No. S-05-000367 (Sept. 9, 2005).

B. The Decision Of The Nebraska Supreme Court Was Based Exclusively Upon The Due Process Clause Of The Fourteenth Amendment.

The Nebraska Supreme Court began its analysis of the admissibility of the mother's testimony by quoting the trial court's conclusion that the testimony of the victim's mother was "'not so prejudicial as to have denied the defendant his right to a fair trial.'" *Iromuanya*, 719 N.W.2d at 281. It was in reviewing this very conclusion by the trial court that the Nebraska Supreme Court applied the test that it and every other state and federal court applies when confronted with a due process or fair trial challenge to the admissibility of evidence -- that is, the balancing test set forth in Federal Rule of Evidence 403 or its state equivalent.

It is well established that Federal Rule of Evidence 403 and its state equivalents provide the exclusive mechanism by which federal and state courts address due process challenges arising from the admission of evidence.[14] Nebraska is no

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[14] *See* Pet. Br. at 9 n.19 (listing cases). The only debate on this issue is not whether Rule 403 is the means by which due process concerns are evaluated but whether the Rule sufficiently protects these concerns. In fact a number of commentators have argued that a defendant's due process rights require even stronger protection than that provided by Rule 403. *See generally* D. Craig Lewis, *Proof and Prejudice: A Constitutional Challenge to the Treatment of Prejudicial Evidence in*

exception, and Respondent does not a single case in which the Nebraska Supreme Court, when faced with a "due process" or "fair trial" challenge to the admission of evidence, applied any test other than Rule 403.

For example, in *State v. Simants*, in reviewing a case in which the defendant argued that the admission of certain testimony violated his "right to due process," the Nebraska Supreme Court held that the testimony "should have been excluded in light of Neb. Evid. R. 403." 537 N.W.2d 346, 351 (Neb. 1995). Similarly, in *State v. Timmerman*, 480 N.W.2d 411 (Neb. 1992), the defendant raised a fair trial objection by arguing that the admission of certain conversations into evidence had denied him "due process of law in accordance with the due process clause." *Id.* at 416. In response, the Nebraska Supreme Court applied the three part test for admissibility set forth in this Court's decision in *Huddleston v. United States*, 485 U.S. 681 (1988), the third part of which requires the trial court to make an assessment "'under Rule 403 to determine whether the probative value of the [challenged] evidence is substantially outweighed by prejudice.'" *Timmerman*, 480 N.W.2d at 419 (quoting *Huddleston*, 485 U.S. at 692). Further, in *State v. Kunert*, No. A-94-1098, 1995 Neb. App. LEXIS 195 (Neb. App. Ct. June 20, 1995), the Nebraska Court of Appeals applied Nebraska Evidence Rule 403 to determine whether the defendant was deprived of "his substantial right to a fair

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Federal Criminal Cases, 64 Wash. L. Rev. 289 (1989) (arguing that a rule excluding prejudicial evidence is constitutionally required, but that Rule 403 permits the admission of too much prejudicial evidence and thereby impairs the reliability of criminal convictions). *See also* Richard D. Friedman, *A Close Look at Probative Value*, 66 B.U. L. Rev. 733, 735 n.8 (1986); Victor J. Gold, *Limiting Judicial Discretion to Exclude Prejudicial Evidence*, [illegible] J.C. Davis L. Rev, 59, 73 (1984).

trial" by the trial court's decision to exclude certain evidence. *Id.* at *19.[15]

As the above authority demonstrates, Nebraska courts follow federal and state precedent by evaluating constitutional due process and fair trial challenges through the application of the Rule 403 balancing test. Respondent cites no cases to the contrary. Accordingly, Respondent's sole argument in opposing the petition -- that Petitioner only raised, and the Supreme Court only addressed, a state law objection -- is without merit.[16]

As a final matter, Respondent objects to Petitioner's citation to facts from newspaper articles on the basis that such articles are not part of the record. While these articles are not part of the Record below, the circumstances they recount are a matter of public record, and Petitioner and *Amicus* contend that those circumstances should have been taken into account in determining whether the mother's testimony was both unduly prejudicial under the balancing test and whether Petitioner was denied his right to an impartial jury.

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[15] Not only does the Nebraska Supreme Court apply the Rule 403 balancing test in the specific context of due process and fair trial challenges to the admission of evidence, but the Supreme Court of Nebraska has stated that it looks for guidance in the Nebraska Rules of Evidence to due process challenges generally. *See In re DLS*, 432 N.W.2d 31, 34 (Neb. 1988).

CONCLUSION

For the foregoing reasons, this Court should grant the petition for a writ of certiorari.

Respectfully submitted,

MICHAEL RIPS
Counsel of Record
AMY LESTER
MARCIA YABLON
JUSTIN B. PERRI
STEPTOE & JOHNSON LLP
750 Seventh Avenue
New York, NY 10019
(212) 506-3900

G. MICHAEL FENNER
James L. Koley '54 Professor of Constitutional Law
CREIGHTON UNIVERSITY SCHOOL OF LAW
2500 California Plaza
Omaha, NE 68178
(402) 280-3090

Attorneys for Petitioner

December 27, 2006